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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALLIED-BRUCE TERMINIX COMPANIES, INC., AND TERMINIX INTERNATIONAL COMPANY,

Petitioners,

v.

G. MICHAEL DOBSON, WANDA C. DOBSON, STEVEN GWIN AND JAN GWIN,

Respondents.

On Writ of Certiorari To The Supreme Court of Alabama

BRIEF *AMICI CURIAE* OF THE AMERICAN BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND ITT CONSUMER FINANCIAL CORPORATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE**

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money centers, regional and community banks. ABA members hold approximately ninety-five percent of the domestic assets of United States banks. The ABA frequently appears in litigation as either a party or as *amicus curiae* where the issues raised are of widespread importance and concern to banks or consumers of banking services. ABA members regularly include arbitration agreements in their loan and other contracts.

The American Financial Services Association ("AFSA") was organized in 1916, and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail, and automobile companies. The AFSA's membership includes national and state banks that operate multistate consumer credit programs. AFSA's members frequently rely on arbitration agreements as dispute resolution mechanisms.

ITT Consumer Financial Corporation ("ITT") is a nationwide business, with headquarters in Minnesota, that provides consumer loans and related services. A substantial number of ITT's consumer loan contracts

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* Counsel to the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

contain arbitration agreements. The efficiency of dispute resolution available from arbitration is essential to ITT's ability to offer consumer loans on competitive terms. ITT has been involved in litigation challenging the validity of its arbitration agreements under various state-law barriers to arbitration. ITT has argued that such state laws and policies are preempted by the broad reach of the Federal Arbitration Act. *See, e.g.*, *Patterson* v. *ITT Consumer Fin. Corp.*, 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563 (1993), *cert. denied*, 114 S. Ct. 1217 (1994).

Amici curiae have a strong interest in the enforcement of arbitration agreements in all of their contracts. They file this brief because the policy adopted by the Alabama Supreme Court in this case materially narrows the scope and effectiveness of the Federal Arbitration Act. Failure to overturn that policy inevitably would subject substantial numbers of contracts that involve interstate commerce to state statutes and common law hostile to the enforcement of arbitration agreements.

SUMMARY OF ARGUMENT

The Federal Arbitration Act ("FAA" or the "Act"), 9 U.S.C. §§ 1, *et seq.*, applies to arbitration provisions in "contract[s] evidencing transaction[s] involving commerce." *Id.* § 2. The Alabama Supreme Court has adopted a rule that the Act applies only when the parties to a contract "*contemplated substantial* interstate activity." Pet. App. 4a (emphasis added). The "contemplation-of-the-parties" test is an anachronism that cannot be reconciled with the FAA and the strong federal policy favoring the enforcement of arbitration agreements.

The contemplation-of-the-parties test was first promulgated to restrict the scope of the FAA at a time when some courts were uncertain about the preemptive effect of the Act. However, in the 30 years since Judge Lumbard proposed the test in his concurring opinion in *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961), this Court has removed any doubt about the broad effect of the FAA. The Court has established decisively that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In contrast, the Alabama Supreme Court has acknowledged that it adopted the contemplation-of-the-parties test precisely because of Alabama's strong public policy *against* arbitration.

The FAA was enacted nearly 70 years ago to end the hostility toward arbitration that Alabama and certain other states continue to display today. The Act and the strong federal policy that it enunciates demand that the statute be applied coextensively with Congress' Commerce Clause powers. The cost of applying the FAA more narrowly, as the Alabama Supreme Court has done in this case, is to allow the application of a variety of hostile state laws to prevent the enforcement of arbitration agreements within the scope of the federal interest. Alabama's narrow, subjective and elusive test both undermines federal policy and makes the Act's application uncertain and inconsistent.

Where parties to a contract involving interstate commerce agree to arbitrate differences between them, the policy of the FAA is frustrated if the arbitration provision is not enforced, regardless of the claims by either of the parties concerning their "contemplation" of interstate commerce. Alabama's policy *against* arbitration must not be allowed to trump federal policy in *favor* of arbitration.

ARGUMENT

I

THE CONTEMPLATION-OF-THE-PARTIES TEST IS A REMNANT OF AN ANACHRONISTIC AND NARROW VIEW OF THE FEDERAL ARBITRATION ACT THAT CONTRADICTS THE BROAD FEDERAL POLICY FAVORING ARBITRATION

Early in this century, the increasing complexity of the American economy and the growing expense and delay of litigation created great pressures in favor of more efficient mechanisms for the resolution of disputes. Arbitration offered an important alternative for dispute resolution, but its full effectiveness was stymied by the refusal of common-law courts to enforce arbitration agreements. Therefore, Congress passed the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). *See also Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219-220 & n.6 (1985).

The FAA expressed congressional recognition not only of the great value of arbitration to the efficient

flow of commerce but also of the costs imposed by judicial hostility toward arbitration. *See* S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924) ("The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals."); H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924) ("It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."). The FAA sought to promote arbitration as a benefit to commerce by making "valid, irrevocable, and enforceable" written arbitration provisions in "contract[s] evidencing transaction[s] involving commerce." 9 U.S.C. § 2.

While the FAA plainly expresses a strong federal policy favoring arbitration, there was initial uncertainty regarding the nature and scope of the Act. The early assumption was that the FAA applied only in federal courts. J.H. Cohen & K. Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 277-278 (1926); H. Baum & L. Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. Rev. 428, 430-431, 459-460 (1930-1931). While the Act does not grant federal-question jurisdiction, federal courts applied it to state-law contract actions in diversity cases.[1] There was, however, little if any effort to apply it in state court. Baum & Pressman, 8 N.Y.U. L.Q. Rev. at 459-460.

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[1] *See, e.g., Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449 (1935); *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.*, 62 F.2d 1004, 1006 (2d Cir. 1933); *In re Woerner*, 31 F.2d 283, 284 (2d Cir. 1929).

Moreover, there was confusion both as to whether enforcement of arbitration provisions was a substantive or procedural requirement and whether the FAA was an exercise of Congress' Commerce Clause powers or its supposed power to prescribe general substantive law for the federal courts. *See* H.C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 391 n.33 (1992); J.F.Nooney, *Commercial Arbitration in Federal Courts*, 20 Vand. L. Rev. 607, 612 (1967); Cohen & Dayton, 12 Va. L. Rev. at 278; Baum & Pressman, 8 N.Y.U. L.Q. Rev. at 430.

The resolution of these issues became particularly significant when the Court decided *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), requiring the application of state substantive law in diversity cases. If the FAA had constituted a congressional attempt to legislate a substantive rule of decision in diversity cases for the federal courts alone, it would have created obvious tensions with *Erie*, for *Erie* would, under those circumstances, call for state substantive arbitration laws to be applied in diversity cases. This Court resolved these and other issues concerning the scope of the Act in a series of decisions in the 1980s establishing that the FAA is, indeed, a federal substantive regulation of commerce with broad preemptive effect, applicable in *both* federal and state courts.

The contemplation-of-the-parties test under review in this case was articulated well before the Court's decisions of the 1980s. It is the product of an era when some courts remained uncertain both about the scope of the FAA and about whether to give the Act

its fullest reach into state contractual disputes. The test embodies a now thoroughly discredited view that the FAA is narrow in scope and it clashes with the FAA's sweeping federal policy in favor of arbitration.

A. The FAA Is A Commerce Clause Enactment That Reaches All Contracts Within The Scope Of Congressional Authority.

In its first post-*Erie* FAA case, the Court held that the FAA's mandate to enforce agreements to arbitrate disputes is substantive law: "[A]rbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action." *Bernhardt* v. *Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 203 (1956). Next, the Court made explicit that Congress enacted the FAA pursuant to "the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924)). *Bernhardt* and *Prima Paint* did not, however, address explicitly either the Act's application in state court or its preemptive effect.

In the 1980s, the Court addressed these issues and laid to rest any lingering doubts about the scope of the FAA. Those cases establish that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding *any* state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24 (emphasis added). As an exercise of Congress' Commerce Clause powers, the substantive rules of the Act must apply

in state as well as federal courts, a fact the Court acknowledged in *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984). The Act embodies a strong federal policy favoring the enforcement of arbitration agreements, abrogating historic state hostility to arbitration, and superseding any contrary rule of law from either the federal courts or the states: "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16.

Southland Corp. and *Perry* v. *Thomas*, 482 U.S. 483 (1987), decisively articulate the broad preemptive effect of the FAA. The Act preempts all state laws or policies that would preclude enforcement of arbitration agreements, including those laws that preclude arbitration only in a limited context. *See Southland Corp.*, 465 U.S. at 16 (FAA preempts state law precluding arbitration of disputes over franchise agreements); *Perry*, 482 U.S. at 491 (FAA preempts state law precluding arbitration of disputes over wages). "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10; *Perry*, 482 U.S. at 489.

The FAA preempts not only arbitration-hostile state laws. Even the application of neutral state-law principles that affect the enforcement of arbitration provisions must be applied consistently with the federal policy. "[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due

regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-476 (1989) (citation omitted). "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

Taken together, the Court's decisions establish that the FAA is a broad and preemptive pronouncement of a federal requirement that all arbitration agreements within Congress' Commerce Clause authority must be enforced despite state-law rules and devices that might be utilized to defeat arbitration.

B. The Contemplation-of-the-Parties Test Is Plainly Inconsistent With This Court's FAA Decisions Of The 1980s.

The contemplation-of-the-parties test that the Alabama Supreme Court adopted in this case narrows and confuses the application of the FAA. As such, it is a remnant of a period when some courts remained uncertain of the FAA's preemptive effect, and a product of judicial hostility to arbitration.

The Alabama Supreme Court derived the contemplation-of-the-parties test from Judge Lumbard's concurring opinion in 1961 in *Metro Industrial Painting*, 287 F.2d 382. *See* Pet. App. 4a. Although Judge Lumbard recognized that the FAA applies in state as well as federal courts, he was concerned that Congress

had provided "no clear mandate . . . as to the extent to which state statutes and decisions are to be superseded." 287 F.2d at 386. He, therefore, concluded that "we must be cautious in construing the act" so as to avoid broad preemption. *Id.* His contemplation-of-the-parties test is thus an intentional narrowing of the FAA, derived not from the language or history of the Act, but from a desire to restrict preemption and from an erroneous understanding of the Act's intended reach.

Judge Lumbard proposed the rule well before this Court had established definitively in *Southland Corp.* and *Perry* the Act's broad preemptive effect. The logic of *Southland Corp.*, in particular, is fully applicable to the present case. In holding that the FAA preempts all arbitration-hostile state laws in both federal and state court, the Court explained that Congress intended directly to address "the widespread unwillingness of state courts to enforce arbitration agreements" as well as "the failure of state arbitration statutes to mandate enforcement of arbitration agreements." 465 U.S. at 13-14. The Court concluded that the FAA must be applied broadly to respond to the breadth of the problems the Act addressed: "To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing." *Id.* at 14.

The same reasoning applies here. The contemplation-of-the-parties test, by confining the FAA to a range of contracts narrower than the reach of the Commerce Clause, defeats Congress' intention to enact a broad, uniformly applicable national statute to ensure the enforceability of arbitration agreements.

The *Perry* Court subsequently reiterated that the FAA preempts all state laws that prevent enforcement of arbitration agreements, even if the laws prevent enforcement only in a limited context. The FAA, the Court explained, "embodies Congress' intent to provide for the enforcement of arbitration agreements *within the full reach of the Commerce Clause.*" 482 U.S. at 490 (emphasis added). Thus, in light of its understanding of the FAA's broad reach, *Perry* provides the answer to the question presented in this case. The Court's conclusion and reasoning make it clear that the Alabama decision below is in error.

The purpose of the contemplation-of-the-parties test is to limit the scope of the FAA. That is obvious from Judge Lumbard's opinion in *Metro Industrial* and from the Alabama Supreme Court's own justification for adopting the test. The Alabama court acknowledged explicitly in *Lopez* v. *Home Buyers Warranty Corp.*, 628 So. 2d 361 (Ala. 1993), *petition for cert. filed*, 62 U.S.L.W. 3249 (Dec. 23, 1993) (No. 93-995), that the contemplation-of-the-parties test does not further the policy behind the FAA, or even effectuate Congress' intent regarding the scope of the Act, but was adopted in Alabama precisely because it "better promotes [Alabama's] strong public policy *against* the use of predispute arbitration." *Id.* at 363 n.2 (emphasis added). The contemplation-of-the-parties test is little more than a vestige of state antipathy toward arbitration and an effort to ignore or narrow overarching federal policy.

II

NARROWING THE SCOPE OF THE FAA TO LESS THAN THE LIMITS OF FEDERAL AUTHORITY WILL EXPOSE TO HOSTILE STATE LAWS LARGE NUMBERS OF CONTRACTS WITHIN THE FEDERAL INTEREST

The FAA established a national policy ending hostility toward arbitration because Congress recognized the efficiencies to be achieved through arbitration and rejected arguments that courts provide the only forum capable of resolving disputes fairly. Nevertheless, hostility toward arbitration continues to this day in state courts and legislatures. And state court application of arbitration-hostile state laws to contracts within the federal interest continues to frustrate federal policy.

Alabama is one of three states that have declared unequivocally that their courts will not enforce arbitration agreements governed by state law. *See* Pet. App. 2a ("Predispute arbitration agreements are unenforceable under Alabama law.") (citing Ala. Code 1975, § 8-1-41); *Ex Parte Clements*, 587 So. 2d 317, 319 (Ala. 1991); *McClendon* v. *Shutt*, 115 So. 2d 740, 741 (Miss. 1959); *State* v. *Nebraska Ass'n of Public Employees*, 477 N.W.2d 577, 580 (Neb. 1991). Thus, it is consistent with Alabama policy for the Alabama Supreme Court to interpret the federal law in a manner that allows it to restrict, as sharply as possible, the enforcement of arbitration agreements. *See Lopez*, 628 So. 2d at 363 n.2.

In other states, legislatures have repealed by statute the broad common-law antagonism toward arbitration, but have retained some of this animosity by placing restrictions on arbitration agreements to which other contracts are not subject. Typical are requirements that arbitration provisions contain specific language or citations, appear in particular typeface, or in a certain place within a contract, or that the parties separately initial or sign an arbitration agreement contained in a larger contract.[2]

These mechanical requirements single out arbitration agreements for special scrutiny not imposed on other contracts, but the requirements can, at least theoretically, be met.[3] More problematic are the numerous state statutes that void absolutely any agreement to arbitrate certain types of disputes. For

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[2] *E.g.*, Md. Code Ann., Cts. & Jud. Proc. § 3-206(b) (arbitration agreement must invoke specifically the Maryland statute); Mont. Code Ann. § 27-5-114 (notice of arbitration clause must be underlined, in capital letters, and on first page of agreement); R.I. Gen. Laws § 10-3-2 (arbitration clause must be placed immediately before testimonium clause or signatures in insurance contracts); S.C. Code Ann. § 15-48-10 (notice of arbitration provision must be typed in underlined capital letters, or rubber-stamped prominently, on first page); Vt. Stat. Ann. tit. 12, § 5652(b) (arbitration clause requires exact boilerplate and must be placed prominently); Ga Code. Ann. § 9-9-2(c)(8) (party to be bound must initial arbitration clause in contract for sale or loan agreement regarding residential real estate); Tenn. Code Ann. § 29-5-302 (clause must be initialed/signed in contracts relating to farm property, structures, or goods, or residential real estate contracts); Tex. Rev. Civ. Stat. Ann. art. 224 (separate signature of parties and their lawyers required on arbitration agreement in a contract "for the acquisition by an individual person or persons . . . of real or personal property, or services, or money or credit" where total consideration is $50,000 or less).

[3] These requirements place significant burdens, however, on those doing business on a nationwide basis.

example, many state anti-arbitration laws target agreements to arbitrate insurance disputes, arbitration agreements in consumer loan and other consumer contracts, and, more generally, arbitration agreements appearing in standard form contracts, labeled contracts of "adhesion."[4] In addition, certain state courts appear willing to apply their common-law rules regarding adhesion and unconscionability in a manner particularly hostile to arbitration.[5]

The irony beneath these broader restrictions is that arbitration has its greatest social utility in precisely those contexts in which states are most likely to refuse to enforce arbitration agreements. Insurance contracts, as well as consumer loans and other consumer agreements, generally involve relatively small amounts of money. The pest control contract at issue in the present case is a good example. Such arrangements

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[4] *E.g.*, Ark. Code Ann. § 16-108-201 (insurance agreements and annuity contracts); Ga. Code Ann. § 9-9-2(c) (insurance disputes, consumer loans involving $25,000 or less, purchase of consumer goods, most consumer "acts or practices" or contracts involving consumer transactions); Ind. Code Ann. § 34-4-2-1(b) (consumer leases, sales, and loan contracts); Iowa Code Ann. § 679A.1(2) (adhesion contracts); Kan. Stat. Ann. § 5-401 (insurance contracts); Ky. Rev. Stat. Ann. § 417.050 (insurance contracts); Mo. Ann. Stat. § 435.350 (insurance contracts and contracts of adhesion); Mont. Code Ann. § 27-5-114 (contracts to acquire real/personal property, services, or money/credit where total consideration to be paid is $5,000 or less; insurance policy disputes); Ohio Rev. Code Ann. § 2711.01 (most controversies involving title to/right to possess real estate); S.C. Code Ann. § 15-48-10 (claims under insurance or annuity contracts).

[5] *See, e.g.*, *Broemmer* v. *Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (1992); *Patterson* v. *ITT Consumer Fin. Corp.*, 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563 (1993), *cert. denied*, 114 S. Ct. 1217 (1994).

are made cost-effective for the insurer, lender, or other entrepreneur—and are therefore made available at affordable prices to the consumer—by keeping down transaction and other external costs. The standard form contract is one means of making these transactions more efficient. Because small insurance and consumer transactions tend to be highly similar, the cost of reaching agreement can be reduced substantially by using experience-tested standard forms. *See Northwestern Nat'l Ins. Co.* v. *Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) ("[f]orm contracts, and standard clauses in individually negotiated contracts, enable enormous savings in transaction costs"). These forms thus facilitate the high volumes of insurance and loan transactions that insurers and lenders require to generate a profit. Without standard forms, the cost of negotiating these contracts would increase the cost to consumers in the form of higher insurance premiums or less favorable lending terms, and ultimately might restrict the availability of insurance and consumer loans.

Arbitration agreements provide similar cost-saving benefits. Arbitration lowers the cost of dispute resolution. With contracts involving smaller amounts of money, the potential for costly litigation[6] may overwhelm the benefit the parties derive from the underlying transaction. The expected savings from preselected arbitration mechanisms ultimately benefit

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[6] *See, e.g.*, K. Donovan, *Bound to Arbitration? Bank Trial to Decide*, Nat'l L.J., Jan. 17, 1994, at 1 (Lawyers representing a group of plaintiffs challenging as unconscionable an arbitration clause in form loan contracts "complain that [arbitration] would deny them the discovery and threat of trial that brings about settlements.").

consumers. *Cf. Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (standard forum selection clause in cruise ship contract benefits passengers in the form of reduced fares). It is not surprising, therefore, that arbitration agreements are commonplace in insurance and loan contracts, and are particularly likely to appear in form contracts. Arbitration and the standard form are two sides of the same cost-saving coin. *Cf.* D.B. Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 Cal. L. Rev. 317, 319 (1979) (explaining the benefits of arbitration agreements in standard form sales contracts). *See also Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 225-226 (1987) and *Gilmer*, 500 U.S. at 24, in which the Court enforced arbitration agreements in form contracts.

The Congress that enacted the FAA well understood the value of arbitration to business and the consumer, value that was obvious long before the recent rampant escalation in litigation costs. *See, e.g.*, S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924) ("The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals."); Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 34-35 (1924) ("The evils at which arbitration agreements in general are directed are three in number. (1) The long delay usually incident to a proceeding at law .... (2) The expense of litigation. (3) The failure, through litigation, to reach a decision regarded as just . . . ."). The efficiency of arbitration is the *raison d'être* for the strong federal policy of

the FAA. Arbitration-hostile state policies are the enemies of arbitration efficiencies.

Where the FAA applies, state laws and policies hostile to arbitration are preempted and arbitration must be enforced in furtherance of federal policy. Thus, the FAA must be applied broadly, coextensively with the breadth of the federal policy favoring enforcement of arbitration agreements. The contemplation-of-the-parties test is contrary to the FAA because it narrows the scope of the Act so that the Act no longer achieves its purpose.

The contemplation-of-the-parties test is contrary to the FAA in another way. By tying the jurisdictional question of the Act's application to an inquiry into the parties' subjective intent regarding interstate activity, the test promises to generate frequent satellite litigation before the parties ever are allowed to resolve their underlying dispute. Indeed, as the Alabama Supreme Court recognized, a party to an arbitration agreement in Alabama can now demand that a court resolve the issue of the state of mind of the parties at the time they entered into the agreement. Pet. App. 4a. (quoting *Metro Indus. Painting*, 287 F.2d at 387 (Lumbard, J., concurring)). Such waste of resources is precisely what arbitration, and its enforcement through the FAA, is designed to avoid: "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp.*, 465 U.S. at 7. Moreover, fact-bound inquiry into subjective intent will give virtually un-

reviewable discretion to state courts hostile to arbitration.

In any contract involving commerce in which the parties agreed to arbitrate, the federal policy behind the FAA is frustrated if the agreement is not enforced, regardless of what the parties "contemplated" regarding interstate commerce. The only limitation on the enforcement of such a strong federal policy is the limit of federal authority, not the subjective contemplation of the parties. The Court should reject the contemplation-of-the-parties test and reiterate the strong federal policy enforcing agreements to arbitrate within the full scope of congressional authority.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Alabama Supreme Court.

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